Supreme Court, U.S.
FILED

(1)

NO. 93-1403

MAR - 3 1994

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

PEARL B. ARTHUR, ET AL.,
Petitioners,

V.

BELL ATLANTIC CORPORATION,
THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA,
CHARLES W. CRIST, JR.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Jay J. Levit
Levit & Mann
419 North Boulevard
Richmond, VA 23220
(804) 355-7766

Attorney for Petitioners

Brief Printing Specialist, 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-7000

103 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioners had standing to bring suit as participants in the FMP for alleged misrepresentation by respondents that petitioners would be given "complete information" about the FMP?

2. Whether the Court of Appeals erred in affirming the granting of the motion to dismiss without affording petitioners an opportunity to conduct discovery?

3. Whether the rationale of the Court of Appeals will open the door for employers to effectively mislead employees in an effort to have selected employees choose an inferior retirement plan?

PARTIES TO THIS PROCEEDING

PEARL B. ARTHUR

BASIL D. BOSTIC

JIMMY H. BRADSHER

DORETHA F. GAMMON

DENNY L. HENSLEY

CHARLES G. LLEWELLYN

WALTER R. MASSEY, JR.

MATTIE M. MEADOR

MARGARET W. MOORE

JACK F. PASCHALL

DOROTHY L. PIERCE

KENNETH R. PITTMAN

DONALD L. PORTER

JERRY L. PUGH

RICHARD C. REYNOLDS

ROBERT W. RICE

FLOYD R. ROBINSON

IRVING L. SANFORD, JR.

KENDALL L. WHITE

GEORGE A. WILLS

BELL ATLANTIC CORPORATION

THE CHESAPEAKE AND POTOMAC

TELEPHONE COMPANY OF VIRGINIA

CHARLES W. CRIST, JR., Plan Administrator

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED.....	i
PARTIES TO THIS PROCEEDING.....	ii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW.....	2
JURISDICTION.....	3
STATUTORY PROVISIONS INVOLVED..	3
STATEMENT OF THE CASE.....	3
I.	
I. FACTS AND NATURE OF THE SUIT.....	3
II.	
II. THE PROCEEDINGS BELOW.....	8
REASONS FOR GRANTING THE WRIT..	14
CONCLUSION.....	21

TABLE OF AUTHORITIES

CASES	PAGE
Berlin v. Mich. Bell Tel. Co., 858 F.2d 1154 (6th Cir. 1988).....	18
Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)..	20,21
Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992), cert. den., 61 U.S.L.W. (No. 92-1607, U.S. May 24, 1993).....	18
Fischer v. Philadelphia Electric Co., 994 F.2d 130 (3d Cir. 1993).....	18
Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).....	4
Kurz v. Philadelphia Electric Co., 994 F.2d 136 (3d Cir. 1993).....	18
Scheuer v. Rhodes, 416 U.S. 232 (1974).....	4
Vartanian v. Monsanto Company, 1994 W.L. 20788 (No. 93-1611, 1st Cir. Feb. 2, 1994)....	18,19,21

STATUTES	PAGE
28 U.S.C. § 1254(1).....	3
28 U.S.C. § 1291.....	2
28 U.S.C. § 1331.....	9
29 U.S.C. § 1001 et seq.....	3
29 U.S.C. § 1002(7).....	3
29 U.S.C. § 1132(a).....	3
29 U.S.C. § 1132(e) and (f)....	8
Employee Retirement Income Security Act of 1974 (ERISA).....	3,11, 12,14,22

OTHER AUTHORITIES	
Rule 10.....	14
F.R.C.P. Rule 12(b)(6).....	4,5,10,21
F.R.C.P. Rule 56(f).....	19
Rule 56(c).....	20

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

PEARL B. ARTHUR;
BASIL D. BOSTIC;
JIMMY H. BRADSHER;
DORETHA F. GAMMON;
DENNY L. HENSLEY;
CHARLES G. LLEWELLYN;
WALTER R. MASSEY, JR.;
MATTIE M. MEADOR;
MARGARET W. MOORE;
JACK F. PASCHALL;
DOROTHY L. PIERCE;
KENNETH R. PITTMAN;
DONALD L. PORTER;
JERRY L. PUGH;
RICHARD C. REYNOLDS;
ROBERT W. RICE;
FLOYD R. ROBINSON;
IRVING L. SANFORD, JR.;
KENDALL L. WHITE;
and GEORGE A. WILLS, Petitioners,

v.

BELL ATLANTIC CORPORATION;
and
THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA;
and
CHARLES W. CRIST, JR., Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Pearl B. Arthur, et al. petition this Court for a writ of certiorari to

review a decision of the United States Court of Appeals for the Fourth Circuit entered on December 3, 1993.

OPINIONS BELOW

The December 3, 1993 decision of the United States Court of Appeals for the Fourth Circuit in No. 93-1483, is an unpublished decision referenced in 12 F.3d 204. App. 1a-9a. The March 18, 1993 memorandum opinion of the United States District Court for the Eastern District of Virginia in Civil Action No. 3:92CV854 is an unpublished decision. No citation reference therefor has been found. App. 12a-23a.

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. The primary statutory sections involved are 29 U.S.C. § 1132(a) and 29 U.S.C. § 1002(7). The text of these provisions is reproduced in the Appendix. App. 70a-73a.

STATEMENT OF THE CASE

I.

FACTS AND NATURE OF THE SUIT

Petitioners comprise a group of 20 former managerial employees of Chesapeake & Potomac Telephone Company of Virginia

(C&P). Bell Atlantic Corporation is the parent corporation of C&P and the retirement plan sponsor for C&P employees. Charles W. Crist, Jr. is the plan administrator. Because this case was decided below on a motion to dismiss under F.R.C.P. Rule 12(b)(6), the factual allegations in the complaint are to be taken as true, and are to be construed in the light most favorable to the petitioners. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); Scheuer v. Rhodes, 416 U.S. 232 (1974).

In the district court below, respondents had filed a motion to dismiss or in the alternative for summary judgment. App. 46a. All documents in the Appendix were submitted by the parties and were before the district

court when it granted the motion to dismiss under Rule 12(b)(6). App. 23a.

In February 1991, Bell Atlantic distributed a summary plan description concerning a Force Management Plan (FMP) to approximately 37 C&P managers, including petitioners. App. 4a. The FMP offered early retirement benefits to qualifying managers. In addition to the petitioners who were managers at C&P, there were approximately 2,000 other similar managerial employees of Bell Atlantic who had not been offered the FMP. The FMP was offered only to the C&P managers. App. 34a-35a, para. 15(a). App. 49a, para. 4. During oral argument before the Court of Appeals, respondents' counsel, Donald B. Haller, was asked why the FMP was offered only to some 37 managers of C&P, including petitioners,

when there were some 2,000 or more similar managers employed by Bell Atlantic. Mr. Haller replied stating that at the time, C&P in particular wished to decrease its managerial work force.

At the time Bell Atlantic offered the FMP to petitioners, each of the respondents knew, but did not disclose to the petitioners that they were planning the BAMPP and that it would be offered to approximately 2,000 remaining managerial employees of Bell Atlantic and C&P who had not accepted the terms of the FMP. App. 34a-35a, para. 15(a). The summary plan description (SPD) for the FMP stated in pertinent part:

> "Q. Can a manager change his or her mind after the FMP

application form has been accepted?

A. No. Managers will receive complete information about the separation pay plan [FMP] and pension calculations (if applicable) so that they can make informed decisions. App.4a-5a."

Effective April 1991, petitioners accepted the FMP offer of early retirement. Four months later, respondents distributed information concerning an enhanced early retirement plan designated the Bell Atlantic Management Pension Plan (BAMPP). The thrust of petitioners' complaint is that because respondents promised to provide them with complete information necessary to make an informed judgment concerning

whether to accept the FMP, respondents should have disclosed their intent to offer the BAMPP. App. 5a-6a.

II.

THE PROCEEDINGS BELOW

Jurisdiction in the district court was invoked pursuant to 28 U.S.C. § 1331, and 29 U.S.C. § 1132(e) and (f). App. 26a. Respondents filed a motion to dismiss or in the alternative for summary judgment. App. 46a. During the pendency of this motion, petitioners' counsel submitted an affidavit to the court requesting an opportunity to conduct discovery going to the question of whether the petitioners were furnished complete information as promised in the SPD of the FMP, so that they could make an informed decision on whether to accept

the FMP. App. 55a. The affidavit of Petitioners' counsel (App. 53a-59a) set forth cogent reasons as to why such discovery was necessary, in the interest of justice, to ascertain whether respondents mislead and tricked the petitioners into accepting the FMP when the superior BAMPP was about to be offered only a short time later.

The petitioners had accepted the FMP and terminated their employment pursuant thereto on April 2, 1991 (App. 34a, para. 15(a)) and four months later respondents offered the enhanced BAMPP.

During the pendency of respondents' motion to dismiss, petitioners served on respondents an extensive request for production of documents. Respondents objected to this request, and did not respond to it. Before this dispute was

resolved, the district court granted respondents' motion to dismiss pursuant to F.R.C.P. Rule 12(b)(6). App. 23a. The district court did so notwithstanding the reference in the affidavit of petitioners' counsel (App. 57a) to the November 3, 1992 letter of the Bell Atlantic Benefit Claims Committee to petitioners' counsel (App. 61a-69a). In particular, the affidavit of petitioners' counsel (App. 57a) referenced the following quoted portion of the Benefit Claims Committee's letter (App. 67a):

> "There was no such official information in February 1991, or in fact, until the official Board action authorizing implementation of the 1991 'Window'. Accordingly, the Committee determined that no

> relevant **official** information was withheld from [petitioner] Mr. Paschall." (Emphasis supplied.)

In granting respondents' motion to dismiss, the district court held that petitioners' were not ERISA "participants" in the BAMPP because it had not yet been put into effect at the time petitioners terminated their employment under FMP in April 1991. (App. 14a-16a). On the same line of reasoning, the court rejected petitioners' claims under federal common law, holding that there was no duty for respondents to provide petitioners "complete information" since petitioners were not plan participants in the BAMPP, and were not owed a fiduciary duty to be

furnished complete information. App. 20a.

On appeal, the Court of Appeals affirmed that petitioners lacked standing under ERISA to bring their action (App. 4a), but did so on a different rationale. The Court of Appeals stated (App. 8a) that petitioners "have no likelihood of prevailing in a suit for benefits because the plain language on which they base their claim does not constitute a promise to provide information about future benefit plans - it only promises complete information about the Separation Pay Plan, i.e., the FMP. Employees [petitioners] do not allege that C&P [respondent] failed to provide accurate and complete information with respect to the FMP." However, paragraph 10(b) of the complaint (App. 32a) states that "in

order for plaintiffs to have complete information relative to the FMP and plaintiffs' ability to make informed decisions to accept the FMP, plaintiffs needed the 'BAMPP' information set forth hereinbelow in paragraphs 13 through 16 [of the complaint]." Further, respondents withheld from petitioners the fact that petitioners were part of a small group of 37 managerial employees out of more than 2,000 who were being singled out and solely offered an inferior retirement plan to suit the needs at that time of C&P, when they would otherwise be eligible to accept the enhanced BAMPP whose offering to the great majority of managers, similar to petitioners, was imminent.

REASONS FOR GRANTING THE WRIT

The Court should grant this Petition for a Writ of Certiorari because the Court of Appeals (1) has rendered a decision in conflict with decisions of other Courts of Appeal on the same matter; (2) because the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court; and because (3) the Court of Appeals decided a federal question in a way that conflicts with applicable decisions of this Court. Rule 10.

ERISA was designed to protect, among other things, the retirement benefits for laymen, not necessarily lawyers. The reasoning of the Court of Appeals is, in the eyes of laymen so technical as to be misleading. After all, it was Bell

Atlantic that promulgated the question, "Can a manager change his or her mind after the FMP application form has been accepted?" The obvious import of this question is, if one should discover that the employer is seriously considering a better retirement plan whose offering is imminent, can the employee change his mind after having accepted the inferior retirement plan (FMP)? And it was Bell Atlantic that gave the answer to this question. "No. Managers will receive complete information about the Separation Pay Plan [FMP] and pension calculations (if applicable) so that they can make informed decisions." The basic tenor of the question and answer prepared in advance by Bell Atlantic for the petitioners was that if another plan was under serious consideration and about to

be offered (the BAMPP was offered four months after petitioners terminated their employment under the FMP), that petitioners would be given this information. After all, the primary reason for wanting to change one's mind about accepting the FMP would be that another retirement plan was available and more satisfactory to the employee. The question and answer as framed in advance by Bell Atlantic was couched in deliberate, technical terms, designed to mislead the petitioners, and to get them to retire under the lesser FMP in order to satisfy C&P's need to decrease its work force at that time.

In short, respondents deliberately and materially mislead the petitioners, causing them to retire under a lesser plan (FMP) when at the time respondents

knew that they were seriously considering the enhanced BAMPP, and that its offering was imminent.

The Fourth Circuit's designating its opinion as "unpublished", and as having no precedent in the Fourth Circuit should not be a factor in determining whether to grant certiorari. The rationale in this case utilized by the Court of Appeals will surely be well-known and well-publicized, and the technical, misleading mindset utilized by the Court of Appeals in its rationale will serve as a model for employers to so technically couch their SPD questions and answers for laymen employees, as to mislead employees and maneuver them into accepting lesser retirement benefits in the belief that they have been given complete information about the availability of any enhanced

retirement benefits otherwise available to them.

The Third Circuit, under these facts would have held that the petitioners had standing to sue in this case. Fischer v. Philadelphia Electric Co., 994 F.2d 130 (3d Cir. 1993); Kurz v. Philadelphia Electric Co., 994 F.2d 136 (3d Cir. 1993). The Sixth Circuit would have held that petitioners in this case had standing to sue. Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992), cert. den., 61 U.S.L.W. (No. 92-1607, U.S. May 24, 1993); Berlin v. Mich. Bell Tel. Co., 858 F.2d 1154 (6th Cir. 1988). The First Circuit would have held that petitioners had standing to sue in this case. Vartanian v. Monsanto Company, 1994 W.L. 20788 (No. 93-1611, 1st Cir. Feb. 2, 1994).

The material facts in Vartanian are essentially the same as in the case at bar. Both Vartanian and the petitioners in this case were materially mislead by the employer. Petitioners adopt the rationale set forth by the First Circuit in Vartanian to support their position that they had standing as participants in the FMP to bring suit, for having been materially mislead by respondents with respect to the availability to them and the imminent offering of the enhanced BAMPP.

The district court should not have decided this case on a motion to dismiss, particularly when petitioners had requested discovery under F.R.C.P. Rule 56(f). App. 54a. According to the plan administrator, Mr. Crist, he attended Bell Atlantic Human Resources Committee

meeting on August 13, 1991, proposed adoption of the BAMPP enhanced retirement incentive, and this was adopted by Bell Atlantic at the August 13, 1991 meeting. App. 51a, paras. 6 and 7. However, common sense dictates that substantially prior to that time, respondents were seriously engaged in planning the BAMPP's superior benefits and options which were not disclosed by the respondents to the petitioners at the time the petitioners accepted the FMP. App. 55a. In Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), this Court states that "(i)n our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to

that party's case, and on which that party will bear the burden at trial." (Emphasis added.) Petitioners called this to the attention of the district court, and in order to avoid this holding of the Court in Celotex, the district court hastened to grant respondents' motion to dismiss under Rule 12(b)(6). Under the facts of this case, as well as the rationale of the First Circuit in Vartanian, the Court of Appeals should not have affirmed the district court, and at a minimum should have remanded the case so that the petitioners would have adequate time for discovery.

CONCLUSION

For the above reasons, this Court should issue a writ of certiorari to hear this case and to reverse the decision of

the Fourth Circuit denying the petitioners their day in court on the grounds that they had no standing to sue. The petitioners were mislead by carefully and cleverly crafted language of Bell Atlantic in the SPD. This is contrary to the spirit and purpose of ERISA.

Respectfully submitted,

Jay J. Levit
Levit & Mann
419 North Boulevard
Richmond, VA 23220
(804) 355-7766

Attorney for Petitioners

APPENDIX

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
Decided December 5, 1993

PEARL B. ARTHUR, BASIL D. BOSTIC, JIMMY H. BRADSHER, DORETHA F. GAMMON, DENNY L. HENSLEY, CHARLES G. LLEWELLYN, WALTER R. MASSEY, JR., MATTIE M. MEADOR, MARGARET W. MOORE, JACK F. PASCHALL, DOROTHY L. PIERCE, KENNETH R. PITTMAN, DONALD L. PORTER, JERRY L. PUGH, RICHARD C. REYNOLDS, ROBERT W. RICE, FLOYD R. ROBINSON, IRVING L. SANFORD, JR., KENDALL L. WHITE, and GEORGE A. WILLS,

Plaintiffs-Appellants,

v. No. 93-1483

BELL ATLANTIC CORPORATION; CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA; CHARLES W. CRIST, JR.,

Defendants-Appellees.

EQUAL EMPLOYMENT ADVISORY COUNCIL,

Amicus Curiae

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-94-854)

Argued: October 27, 1993
Decided: December 3, 1993

Before WIDENER and WILKINS, Circuit Judges, and SPROUSE, Senior Circuit Judge

---

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Jay Joseph Levit, LEVIT & MANN, Richmond, Virginia, for Appellant. Donald Bell Haller, Washington, D.C., for Appellee.

ON BRIEF: Stephen R. Bruce, Washington, D.C., for Appellants. Robert E. Williams, Douglas S. McDowell, Thomas W. Reed, MCGUINESS & WILLIAMS, Washington, D.C., for Amicus Curiae.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

A group of 20 former managerial employees of Chesapeake and Potomac Telephone Company of Virginia (Employees) brought this action alleging that C&P[1] breached fiduciary duties owed to them under the Employee Retirement Income Security Act of 1974, 29 U.S.C.A. §§ 1001 et seq. (West 1985 & Supp. 1993) (ERISA), and was liable to them under the federal

---

[1]Employees brought suit against Chesapeake and Potomac Telephone Company of Virginia; its parent corporation and plan sponsor, Bell Atlantic Corporation; and the plan administrator, Charles W. Crist, Jr. For ease of reference, we refer to the defendants collectively as "C&P."

common law of ERISA. The district court dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), holding that Employees had not stated a claim upon which relief could be granted. Because we conclude that Employees lack standing under ERISA to bring this action, we affirm.

I.

In February 1991, C&P distributed documents constituting a summary plan description concerning a Force Management Plan (FMP to approximately 37 managers, including Employees. The FMP, also referred to as the Separation Pay Plan, offered early retirement benefits to qualifying managers. The summary plan description of the FMP stated in pertinent part:

Q. Can a manager change his or her mind after the FMP application form has been accepted?

A. No. Managers will receive complete information about the Separation Pay Plan and pension calculations (if applicable) so that they can make informed decisions.

Effective April 1991, Employees accepted the offer of early retirement under the FMP. Four months later, C&P distributed information concerning an enhanced early retirement plan designated the Bell Atlantic Management Pension Plan (BAMPP). The thrust of Employees' complaint is that because C&P promised to provide them with complete information necessary to make an informed judgment

concerning whether to accept the FMP, it should have disclosed its intent to offer the BAMPP.

The district court granted C&P's motion to dismiss. Relying on Stanton v. Gulf Oil Corp., 792 F.2d 432 (4th Cir. 1986), the district court reasoned that because the BAMPP had not been adopted when Employees separated from employment they were not eligible to participate in that plan and, therefore, did not have standing to bring an ERISA action. Employees do not challenge on appeal the ruling of the district court that they lacked standing to seek benefits under the BAMPP. Rather, they maintain that they have standing under ERISA to enforce the provisions of the FMP, including the promise in the summary plan description

that they would be provided with complete information.

II.

The civil enforcement provisions of ERISA permit an action to be brought by the Secretary, a fiduciary, a participant, or a beneficiary. 29 U.S.C.A. § 1132(a) (West 1985 & Supp. 1993). Employees maintain that they have standing to bring this action as "participants" in the FMP. ERISA defines a "participant" to include "any employee or former employee of an employer, ... who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C.A. § 1002(7) (West Supp. 1993). A former employee is a "participant" entitled to bring suit under ERISA if the employee has "a reasonable expectation of returning to

covered employment" or "a colorable claim to vested benefits." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117 (1989) (internal quotation marks omitted).

Employees maintain they qualify as former employees with a colorable claim for benefits. We disagree. Employees have no likelihood of prevailing in a suit for benefits because the plain language on which they base their claim does not constitute a promise to provide information about future benefit plans-it only promises complete information about the Separation Pay Plan, i.e., the FMP. Employees do not allege that C&P failed to provide accurate and complete information with respect to the FMP. Accordingly, they are not former employees with a colorable claim of

entitlement to benefits and therefore, do not have standing under 29 U.S.C.A. § 1132(a) to maintain this action. See Shawley v. Bethlehem Steel Corp., 989 F.2d 652, 657 (3d Cir. 1993); Sallee v. Rexnord Corp., 985 F.2d 927, 929-30 (7th Cir. 1993). Thus, we conclude that the district court properly dismissed Employees' complaint based on their lack of standing.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PEARL B. ARTHUR, et al.,

Plaintiffs,

v. Civil Action No. 3:92CV854

BELL ATLANTIC CORPORATION, et al.,

Defendants.

FINAL ORDER

This matter is before the Court on the defendants' motion to dismiss, or in the alternative, for summary judgment. For the reasons set forth in the accompanying Memorandum Opinion, the defendants' motion to dismiss is GRANTED, and this action is DISMISSED with prejudice.

It is so ORDERED.

Let the Clerk send a copy of this Final Order and the accompanying

Memorandum Opinion to all counsel of record.

18 March 1991 /s/ Richard L. Williams
Date SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PEARL B. ARTHUR, et al., FILED MARCH 18, 1993

Plaintiffs,

v. No. 3:92CV854

BELL ATLANTIC CORPORATION, et al.,

Defendants.

MEMORANDUM OPINION

This matter is before the Court on the defendants' motion to dismiss, or in the alternative, for summary judgment. Fourth Circuit precedent makes it clear that defendants are entitled to judgment as a matter of law. Thus, even construing the allegations in the plaintiffs' Complaint in the light most favorable to them, as the Court is required to do, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), the law mandates

that the defendants' motion to dismiss be granted.

I. Count One: Breach of Fiduciary Duties Under ERISA

Count One fails to state a claim upon which relief can be granted. The Fourth Circuit explicitly rejected the plaintiffs' proposed theory of recovery in Stanton v. Gulf Oil Corp., 792 F.2d 432 (4th Cir. 1986). The Stanton court held that the fiduciary duties which arise under ERISA are owed only to "participants" in an ERISA plan enhancement until the terms of the enhancement are actually adopted in the Plan. Plaintiffs do not allege that the enhanced benefit package announced to employees on or about August 14, 1991 had been adopted as part of Bell's management pension plan before plaintiffs accepted

the severance pay retirement incentive offered through the FMP. Thus, plaintiffs were not "participants" in the enhancement and cannot state a claim for breach of fiduciary duty relating to any information contained therein.

The Fourth Circuit in Stanton affirmed the district court's award of summary judgment in favor of the defendants because plaintiff was not a "participant" in the pension enhancement and thus had no claim for a breach of fiduciary duty. The Stanton court observed that only a plan "participant," "beneficiary," "fiduciary" or the Secretary of Labor can bring a civil action under ERISA. 792 F.2d at 434, citing 29 U.S.C. § 1132(a)(2). The Court of Appeals held that an employee cannot be a "participant" in pension plan

amendments increasing benefits before those amendments are put into effect:

> It is not a violation of ERISA to fail to furnish information regarding amendments before those amendments are put into effect.... This is so because the legislative intent of ERISA was not to assure the sanctity of early retirement expectation, but to safeguard accrued retirement benefits.
>
> . . . . . .
>
> Although ERISA does mandate fiduciary duties with respect to employee benefit plans, such duties are solely with respect to participants. The duties do not begin until the terms at

issue are incorporated into a plan.

Stanton, 792 F.2d at 435 (emphasis supplied).

The essence of the claim in this case is that defendants breached a fiduciary duty before the plaintiffs retired by failing to inform them about pension plan amendments which were not adopted until after the plaintiff already had retired and accepted benefits under a previous version of the plan. This claim is not cognizable under ERISA.

Plaintiffs' attempts to distinguish Stanton are of no moment. The factual differences between this case and that one are trivial and of no legal significance. The Stanton court's recognition of an alternative factual basis for affirming the entry of summary

judgment in no way diminished its definitive legal conclusion that "[t]he district court correctly granted Gulf Oil's motion for summary judgment on the basis that Stanton was not a participant in the [plan] and could not ... bring this action under ERISA." 792 F.2d at 435. Furthermore, plaintiffs' attempts to characterize their suit as one to "enforce the SPD of the FMP" do not alter the Court's analysis. The gravamen of plaintiffs' Complaint is that they were not told about increased pension benefits which had not yet been adopted. Stanton dictates that such a cause of action cannot withstand defendants' motion to dismiss.

II. Count Two: Breach of Contract/Promissory Estoppel

Plaintiffs assert a separate breach of contract claim in their Complaint which they now characterize as a "breach of fiduciary duty and promissory estoppel" claim. Were there claims based on state law, they clearly would be preempted. Powell v. Chesapeake & Potomac Telephone Co. of Virginia, 780 F.2d 419, 422 (4th Cir. 1985). In an attempt to avoid preemption, plaintiffs couch their claims in "the federal common law of ERISA." The Court is well aware of its responsibility to help develop "a federal common law of rights and obligations under ERISA-regulated plans." Singer v. Black & Decker, 964 F.2d 1449, 1452 (4th Cir. 1992). Of course, such law is not to be created willy-nilly, as the Fourth Circuit recognized:

> [C]ourts must be conscientious to fashion federal common law only when it is necessary to effectuate the purposes of ERISA. Thus, resort to federal common law is generally inappropriate when its application would conflict with the statutory provisions of ERISA, discourage employers from implementing plans governed by ERISA, or threaten to override the explicit terms of an established ERISA benefit plan.

Id. (citations omitted).

With these principles in mind, the Court is left with no choice but to dismiss plaintiffs' contract claim. This is clearly an instance where the asserted

common law cause of action is unwarranted. The Court cannot legitimize a promissory estoppel or breach of fiduciary claim under ERISA common law when the alleged fiduciary duty, which is the basis of the claim, never even existed under ERISA. The plaintiffs were not plan participants; thus, they were not owed a fiduciary duty, no matter how their claim is dressed up. The Court cannot hold a party liable for failing to provide "complete information"where, as a matter of law, there was no duty to disclose <u>any</u> information regarding a subsequent plan enhancement until that enhancement was incorporated into the pension plan. No case cited by plaintiffs decides a truly analogous fact pattern in any other fashion.

Singer counsels that the creation of federal common law under ERISA is generally inappropriate under certain circumstances, two of which exist here. First, plaintiffs' common law cause of action "conflict[s] with the statutory provisions of ERISA," Singer, 964 F.2d at 1452, which explicitly provide that only plan "participants," "beneficiaries," "fiduciaries" or the Secretary of Labor can bring a civil action under ERISA. 29 U.S.C. § 1132(a)(2). Stanton leaves no doubt that plaintiffs are none of the above; to permit them to maintain their common law cause of action would contradict the statute. Second, the common law theory plainly would "discourage employers from implementing plans governed by ERISA." Singer, 964 F.2d at 1452. Employees undoubtedly

benefit when their employers upgrade severance packages and implement more generous pension benefit plans for their workers. Recognition of plaintiffs' cause of action would have a chilling effect on such activity, as employers would be frightened even to put proposed new packages on the drawing board for fear that they might get sued for failing to disclose plans that are not yet, and may never be, formally adopted. As the Stanton court noted, the purpose of ERISA is "to safeguard accrued benefits." 792 F.2d at 435 (emphasis supplied). This purpose clearly is not served by recognizing the common law theory advanced by plaintiffs here.

Plaintiffs in Count Two essentially ask the Court to toss a common law life

preserver to a claim that is dead in the ERISA waters. This it will not do.

III. Conclusion

For the reasons stated above, defendants are entitled to judgment as a matter of law. Even construing the facts of this case in the light most favorable to plaintiffs, their Complaint is fatally deficient under Fed. R. Civ. P. 12(b)(6).

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Final Order to all counsel of record.

18 March 1993
Date

/s/ Richard L. Williams
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PEARL B. ARTHUR, BASIL D. BOSTIC, JIMMY H. BRADSHER, DORETHA F. GAMMON, DENNY L. HENSLEY, CHARLES G. LLEWELLYN, WALTER R. MASSEY, JR., MATTIE M. MEADOR, MARGARET W. MOORE, JACK F. PASCHALL, DOROTHY L. PIERCE, KENNETH R. PITTMAN, DONALD L. PORTER, JERRY L. PUGH, RICHARD C. REYNOLDS, ROBERT W. RICE, FLOYD R. ROBINSON, IRVING L. SANFORD, JR., KENDALL L. WHITE, and GEORGE A. WILLS, Plaintiffs,

v. Case No. _____

BELL ATLANTIC CORPORATION,
a Delaware corporation

SERVE: Edward R. Parker, Esquire
Registered Agent
5511 Staples Mill Road
Richmond, VA 23228

and

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA,
a Virginia corporation

SERVE: Hubert R. Stallard
President and Registered Agent
600 East Main Street
Richmond, VA 23261

and

CHARLES W. CRIST, JR.,
Vice President, Bell Atlantic
One Bell Atlantic Plaza
1310 North Court House Road
Arlington, VA 22201, Defendants.

COMPLAINT

A. Preliminary Statement

1. This is a civil action brought pursuant to 29 U.S.C. §1132, for damages by former employees against their former employers and Charles W. Crist, Jr. (hereafter "Plan Administrator") defendant Bell Atlantic Corporation's (hereafter "Bell") authorized officer, agent, and Plan Administrator, by reason of certain acts and omissions violative of The Employee Retirement Income Security Act (hereafter "ERISA"), 29 U.S.C. §§ 1001, et seq.

B. Jurisdiction and Venue

2. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331, and 29 U.S.C. §§ 1132(e)(2) and (f).

3. Venue lies within this federal district and division, pursuant to 28 U.S.C. § 1391(b) and 29 U.S.C. § 1132(e)(2). Both corporate defendants reside and do business within this judicial district. The ERISA plans in question are administered and breaches of ERISA occurred within this judicial district and division, where many of the plaintiffs were employed by Bell and The Chesapeake and Potomac Telephone Company of Virginia (hereafter "C&P").

C. Parties

Plaintiffs

4. Each plaintiff is a former managerial employee of Bell and C&P; many of the plaintiffs reside in this judicial district and division.

5. Plaintiffs bring this action on their own behalf as former managerial employees of Bell and C&P. In reliance upon certain acts and omissions of the defendants violative of ERISA, and to plaintiffs' detriment, plaintiffs elected termination of employment pursuant to the terms of the defendants' Force Management Plan (hereafter "FMP"), and were thereby damaged, all as more fully described below. Defendants have also referred to the FMP as the "Bell Atlantic Separation Pay Plan," "Separation Pay Plan," and "Plan."

Defendants

6. Defendants Bell and C&P are and were at all relevant times corporations owing fiduciary duties to plaintiffs, with defendant Bell and C&P's principal Virginia places of business and/or registered agents in the City of Richmond. At all relevant times Bell is and was the parent company of defendant C&P. The plaintiffs were employees of Bell and its subsidiary, C&P. Bell was and is the plan sponsor of the FMP as that term ("sponsor") is defined in 29 U.S.C. § 1002(16)(B) of ERISA. C&P was and is a "participating company" in the plan (FMP).

7. Defendant Charles W. Crist, Jr. is and was at all relevant times the Plan Administrator of the FMP, as that term is defined in 29 U.S.C. § 1002(16)(A) of

ERISA, and is and was at all relevant times the named fiduciary of the FMP, as that term is defined in 29 U.S.C. § 1102(a)(2) of ERISA. In addition, he was the Vice-President for Human Resources of Bell on January 1, 1991, and has continued to serve in that position. All acts and omissions of the Plan Administrator herein described were undertaken by him as an authorized officer, employee and agent of Bell, and arose out of and were within the scope of his duties as an officer, employee and agent of Bell. Liability of the Plan Administrator herein is predicated, in part, upon 29 U.S.C. § 1109(a) of ERISA.

D. General Allegations

8. On or about February 8, 1991, Bell published and distributed to the

plaintiffs with the knowledge and approval of C&P and the Plan Administrator documents constituting a summary plan description (hereafter "SPD") of the FMP, as that term (SPD) is defined in 29 U.S.C. § 1022 of ERISA.

9. The FMP was an employee welfare benefit plan, as that term is defined in 29 U.S.C. §1002(1) of ERISA.

10. (a) The SPD included the following promise and representation of defendants in the form of a question and answer:

> Q. "Can a manager change his or her mind after the FMP application form has been accepted?
>
> A. "No. Managers will receive <u>complete information</u> about the

Separation Pay Plan and pension calculations (if applicable) so that they can make informed decisions. Once a signed application to participate in the FMP has been accepted by Human Resources and you have been so notified, it cannot be withdrawn unless the Vice President-Human Resources concludes that there was a material unanticipated change in the employee's circumstances. Under no circumstances may an employee revoke this decision after

terminating employment."

(Emphasis added.)

(b) In order for plaintiffs to have complete information relevant to the FMP and plaintiffs' ability to make informed decisions to accept the FMP, plaintiffs needed the "BAMPP" information set forth hereinbelow in paragraphs 13 through 16.

11. Plaintiffs relied and had a right to rely on the representation set forth in paragraph 10 above, made by defendants, as well as other representations made by defendants, as an inducement to the plaintiffs to accept benefits under the FMP.

12. Having been so induced by defendants, plaintiffs agreed to accept the benefits offered by the FMP and accordingly terminated their employment

with Bell and C&P on or about April 2, 1991. This is what defendants intended.

13. On or about August 14, 1991, Bell and C&P published and distributed to their remaining managerial employees news of and information on the Bell Atlantic Management Pension Plan ("BAMPP"), including information to these managerial employees that the BAMPP was available to them should they apply therefor. This news and information, furnished to these managerial employees in August, 1991, constituted an SPD within the meaning of ERISA, §1022.

14. (a) Under the terms of the BAMPP, plaintiffs would have been entitled to increased and enhanced pension benefits and pension options exceeding the benefits and options

previously accepted by them under the FMP.

(b) Defendant Crist is also the Plan Administrator for the BAMPP, as well as the FMP.

(c) Defendants have not offered the increased benefits and options under the BAMPP to plaintiffs, and have told them that the increased benefits and options are not available to plaintiffs.

15. (a) Prior to and at the time defendants published and distributed to approximately thirty-seven (37) employees, including plaintiffs, the SPD of the FMP in February, 1991, and prior to the time plaintiffs accepted the FMP and terminated their employment pursuant thereto on April 2, 1991, each of the defendants knew, but did not disclose to the plaintiffs, that they (defendants)

were planning the BAMPP and that they (defendants) intended to make the enhanced BAMPP available to the approximately two thousand (2,000) remaining managerial employees of Bell and C&P who had not accepted the terms of the FMP.

(b) Defendants did not disclose their plans for the enhanced BAMPP to the plaintiffs, notwithstanding defendants' representation to the plaintiffs as set forth in paragraph 10 above, promising plaintiffs that they would be given complete information so that each plaintiff could make an informed decision on the FMP.

(c) As early as February 1, 1991, if not earlier, defendant Bell advised Hubert R. Stallard, President of

defendant C&P, of Bell's plans to offer to employees the BAMPP.

(d) In May, 1991, if not earlier, defendants Bell and C&P notified their managers of the plan to offer the BAMPP to employees.

(e) In late October, 1990, at the Airport Hilton Motel in Norfolk, Virginia, defendant Bell, through its authorized management personnel, expressly recognized and so stated to a group of assembled employees Bell's policy and moral and legal obligation to employees presently considering acceptance of a retirement offer, to make disclosure to them of Bell's planned, improved additional retirement incentives not yet offered.

16. (a) Accordingly, notwithstanding the representations of

defendants to the plaintiffs that they would be given "complete information" about the FMP "so that they can make informed decisions" on whether to accept the FMP, the defendants withheld complete information from the plaintiffs, and each of the plaintiffs was denied a reasonable opportunity to make an informed decision on whether to accept the terms of the FMP.

(b) Complete information on the FMP would and should have included information from defendants that the FMP benefits and options were substantially different from, and were limited and less valuable than the enhanced benefits and options under the BAMPP. The BAMPP was offered by defendants to the remaining managerial employees less than four and one-half months after the plaintiffs had

terminated their employment on April 2, 1991, under the FMP.

(c) As a result of defendants' stated misconduct, each of the plaintiffs was denied a fair opportunity to participate in the enhanced BAMPP.

17. The defendants each had a fiduciary duty under ERISA to make a full, fair, non-misleading, and timely disclosure of all material facts relevant to the FMP to plaintiffs, so that plaintiffs each could make an informed decision whether to accept the benefits offered to them under the FMP.

18. The defendants did not make a full, fair, non-misleading, and timely disclosure of all such material facts to the plaintiffs.

19. (a) The referenced representations made by defendants to the

plaintiffs constituted contractually binding promises to furnish plaintiffs complete information relevant to the FMP so that plaintiffs could each make an informed decision on whether to accept the terms of the FMP. The defendants should reasonably have expected that these promises and representations would induce the plaintiffs to accept benefits under the terms of the FMP. In fact,as defendants intended, these promises and representations did induce the plaintiffs to accept in ignorance, through no fault of their own, benefits under the FMP rather than the enhanced benefits and options under the defendants' secretly planned BAMPP.

(b) Injustice to each of the plaintiffs can be avoided only by enforcement of the said promises and

representations, and by awarding to plaintiffs damages equal to the cash value difference between the benefits accepted by plaintiffs under the FMP, and the enhanced benefits and options that would have been payable and available to the plaintiffs under the BAMPP.

20. The offer by the defendants of the BAMPP, and their failure to offer the increased pension benefits and options thereunder to the plaintiffs, constituted a damaging breach of fiduciary duties by defendants of their promises and representations to give each of the plaintiffs complete information relevant to the FMP so that the plaintiffs could make informed decisions on whether to accept the terms of the FMP.

21. (a) Each of the plaintiffs has sought administrative relief from the

Bell Atlantic Benefit Claims Committee, and each has been denied relief by that committee on November 3, 1992.

(b) Each plaintiff has sought administrative relief from the Bell Atlantic Benefit Appeals Committee, which the Appeals Committee presumably is considering.

(c) Because plaintiffs' action in this court is based upon breach of fiduciary duties and contract, seeking such administrative relief is not a prerequisite or precondition to filing suit in this court.

E. Count I (Breach of Fiduciary Duties)

For their Count I against defendants, Plaintiffs state:

22. Plaintiffs incorporate herein by reference the foregoing paragraphs 1 through 21, inclusive.

23. By reason of defendants' breach of their fiduciary duties to plaintiffs by misrepresentations, both affirmatively and by omission, each plaintiff has been substantially economically damaged in an amount to be determined at trial.

WHEREFORE, plaintiffs pray for judgment in this Count I against defendants, jointly and severally, for their damages, plus interest at the applicable legal rate, and for their attorneys' fees and costs pursuant to 29 U.S.C. §1132(g)(1) of ERISA.

P. Count II (Breach of Contract)

For their Count II against defendants, plaintiffs state:

24. Plaintiffs incorporate herein by reference the foregoing paragraphs 1 through 21, and 23.

25. (a) The offer by defendants of the enhanced BAMPP to the remaining managerial employees in August, 1991, and defendants' failure to offer the enhanced pension benefits and options of the BAMPP to plaintiffs, constituted a breach by defendants of their promises to plaintiffs to give them complete information relevant to the FMP so that the plaintiffs could make informed decisions thereon. Defendants' planning of the BAMPP, intention to offer same, and information pertaining to the BAMPP constituted a critical part of the complete information relevant to the FMP to which plaintiffs were entitled but which defendants withheld.

(b) Plaintiffs relied to their detriment and damage upon these promises in that they made uninformed decisions, without complete, relevant information, to accept the FMP.

26. Each plaintiff has been substantially economically damaged in an amount equal to the cash value difference between the benefits accepted by them under the FMP, and the more valuable benefits and increased options that would have been payable and available to them under the BAMPP, said amount to be determined at trial.

WHEREFORE, plaintiffs pray for judgment in this Count II against defendants, jointly and severally, for their damages plus interest at the applicable legal rate, and for their

attorneys' fees and costs pursuant to 29 U.S.C. §1132(g)(1) of ERISA.

TRIAL BY JURY IS DEMANDED.

PEARL B. ARTHUR,
et al.,

By_____
Counsel

Jay J. Levit, Esquire
Va. Bar No. 5637
John B. Mann, Esquire
Va. Bar No. 9108
LEVIT & MANN
419 North Boulevard
Richmond, Virginia 23220
(804) 355-7766

Stephen R. Bruce, Esquire
Ninth Floor
727 15th Street, N.W.
Washington, D.C. 20005
(202) 371-8013

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PEARL B. ARTHUR, et al.,

Plaintiffs,

v. Civil Action No. 3:92CV854

BELL ATLANTIC CORPORATION, et al.,

Defendants.

DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Defendants Bell Atlantic Corporation, The Chesapeake and Potomac Telephone Company of Virginia, and Charles Crist, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, hereby move that Plaintiffs' Complaint be dismissed with prejudice for failure to state a claim upon which relief can be granted for the reasons set forth in the attached Memorandum in Support.

In the alternative, pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendants move for summary judgment against Plaintiffs because there is no genuine issue of material fact, as set forth in the attached Memorandum in Support.

Respectfully submitted,

/s/ Harrison Bush
Harrison Bush
600 E. Main Street,
24th Floor
Richmond, Virginia 23219
(804) 772-1510
Attorney for Defendants

Of Counsel

Donald B. Haller
1710 H Street, N.W., 9th Floor
Washington, D.C. 20006
(202) 392-1076

STATE OF VIRGINIA)
) ss
COUNTY OF ARLINGTON)

AFFIDAVIT

I, Charles Crist, being first duly sworn, hereby state as follows:

1. I am the Vice President, Human Resources of the Bell Atlantic Corporation. I have held this position since August 1, 1990. I have personal knowledge of the facts related to this Affidavit.

2. I am responsible for developing possible solutions to various human resources problems at Bell Atlantic, including surplus management work force conditions.

3. Bell Atlantic has a Separation Pay Plan (hereinafter "SPP")

which provides certain benefits for employees of participating Bell Atlantic companies who are offered an opportunity to volunteer to terminate their employment and are accepted under a Force Management Plan (hereinafter, "FMP").

4. A FMP was offered to some management employees of The Chesapeake and Potomac Telephone Company of Virginia (hereinafter, "C&P of Virginia"), a Bell Atlantic company that participates in the SPP, on or about February 12, 1991. Volunteers were required to apply for acceptance by March 14, 1991. Managers whose applications

were accepted were notified on or about March 20, 1991, and then required to leave the payroll on or about April 1, 1991.

5. During the time that the February 12, 1991 FMP offer was pending, there was no plan to subsequently offer employees of C&P of Virginia or other Bell Atlantic companies an enhancement to pension benefits as a retirement incentive under the Bell Atlantic Management Pension Plan (hereinafter, the "BAMPP"). The SPP is not part of or funded by the BAMPP.

6. The Human Resources Committee of Bell Atlantic Corporation's Board of Directors

(hereinafter, the "HRC") is authorized to make amendments to the BAMPP. I attended an HRC meeting on or about August 13, 1991, and proposed the adoption of a pension enhancement as a retirement incentive for implementation in 1991. I had not submitted any pension enhancement proposal to the HRC at any earlier meeting in 1991.

7. The HRC adopted the pension enhancement retirement incentive proposal at the August 13 meeting, amending the BAMPP to provide enhanced pension benefits for managers who retired as of December 15, 1991.

FURTHER AFFIANT SAYETH NAUGHT

/s/ Charles Crist
Charles Crist

Sworn to before me and subscribed in my presence this 25th day of January, 1993.

/s/ Linda L. Bond
Notary Public

My commission expires: November 30, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PEARL B. ARTHUR, et al.,
Plaintiffs,

v. Civil Action No. 3:92CV854

BELL ATLANTIC CORPORATION, et al.,
Defendants.

AFFIDAVIT OF PLAINTIFFS' COUNSEL PURSUANT TO RULE 56(f), F.R.C.P.

Jay J. Levit, affiant, is counsel for plaintiffs in this action who are opposing the defendants' motion for summary judgment. Essential to this opposition are plaintiffs' response to the three affidavits attached to defendants' motion for summary judgment: affidavit of defendant Crist, affidavit of Hubert R. Stallard, President of defendant C&P, and affidavit of Michelle Arrington, Custodian of Minutes. Plaintiffs' counsel has determined that

counter-affidavits alone are not sufficient to respond to defendants' motion for summary judgment. He believes, based on his initial interviews with witnesses, and based upon responses of defendants to date, that it is essential to file a request for production of documents with defendants, and to thereafter take depositions of defendant Crist, and Hubert R. Stallard, and possibly others. It may also be necessary, after the document production is completed, to file interrogatories and requests for admissions. Counsel cannot make this latter determination at this time.

Plaintiffs have requested the Court to continue its consideration of defendants' motion for summary judgment until plaintiffs have had an adequate

opportunity to conduct this discovery. This discovery will go to plaintiffs' claims for breach of fiduciary duty and promissory estoppel (breach of contract) for failure of defendants to furnish complete, relevant information so that the plaintiffs could have made an informed decision on whether to accept the provisions of the FMP and to terminate their employment with defendants. The affidavit of defendant Crist simply states that the decision on the BAMPP was not made until August 13, 1991. However, common sense dictates that substantially prior to that time, defendants were seriously engaged in planning the BAMPP's superior benefits and options which were not disclosed by the defendants to the plaintiffs at the time the plaintiffs were considering

whether to accept the provisions of the FMP.

From his discussion with witnesses to date, plaintiffs' counsel has information contradicting the affidavit of Hubert R. Stallard which is attached to defendants' motion for summary judgment; and the affidavit of defendant Crist. Further, the amendment to the BAMPP set forth in defendant Crist's affidavit, obviously had to be planned and formulated by various levels of management of defendants quite some time prior to the actual endorsement thereof by the defendants on August 13, 1991. In this connection, attached to this affidavit is copy of the November 3, 1992 letter to plaintiffs' counsel from the Bell Atlantic Benefit Claims Committee. With respect to the claim of non-

disclosure asserted by plaintiffs in this case, the Court's attention in particular is directed to the sentence beginning at the bottom of the second page of that letter which states as follows:

> "There was no such official information in February 1991, or in fact, until the official Board action authorizing implementation of the 1991 'Window'. Accordingly, the Committee determined that no relevant official information was withheld from [plaintiff] Mr. Paschall." (Emphasis supplied.)

The foregoing response from the Committee indicates its careful use of the word "official", and indicates to counsel the need to discover just what

the defendants considered to be "official" vis-a-vis "unofficial" information on the disclosure issue, among other things. Further, plaintiffs' counsel needs time to conduct adequate discovery in order to determine on the record the fiduciary status and/or responsibilities of the defendants. There is authority for liability even if there is no fiduciary status under the proper circumstances, including but not limited to whether there would be a depletion of the plan fund.

All of the foregoing involves material questions of fact for which the plaintiffs need adequate time to conduct discovery to respond to defendants' motion for summary judgment. Plaintiffs' counsel has requested cooperation from defendants' counsel to set dates for the

taking of depositions, but to date defendants' lead counsel, Mr. Haller, has expressly refused to cooperate in the setting of dates for the taking of depositions.

/s/
Jay J. Levit

STATE OF VIRGINIA

CITY OF RICHMOND

The foregoing instrument was acknowledged before me, a Notary Public in and for the jurisdiction aforesaid, by Jay J. Levit, as being true and correct to the best of his knowledge, information and belief, this 22nd day of February, 1993.

My commission expires: April 30, 1995.

/s/ Patricia T. Burton
Notary Public

CERTIFICATE

I certify that on this 22nd day of February, 1993, I mailed by regular United States mail, postage prepaid, true copies of the foregoing to Harrison Bush, Esquire, 600 East Main Street, 24th Floor, Richmond, VA 23219, and Donald B. Haller, Esquire, 1710 H Street, N.W., 9th Floor, Washington, D.C. 20006, counsel for the defendants.

PEARL B. ARTHUR, et al

By_____
Counsel

Jay J. Levit, Esquire
Va. Bar No. 5637
LEVIT & MANN
419 North Boulevard
Richmond, VA 23220
(804) 355-7766

Stephen R. Bruce, Esquire
Attorney at Law
727 15th Street, N.W.
Suite 900
Washington, D.C. 20005

BELL ATLANTIC

Bell Atlantic Network Services, Inc.
Benefit Claims Committee
13100 Columbia Pike,C14
Silver Spring, MD 20904-5247
301 236-1745

V.T. Bartley,Jr.-Secretary
Y.Wilson,Assistant Secretary
G.Bell, Assistant Secretary
B.D'Ascenzo,Assistant Secretary

November 3, 1992

Jay J. Levit
Levit and Mann
419 North Boulevard
Richmond, VA 23220

Dear Mr. Levit:

The Bell Atlantic Benefit Claims Committee is accountable for hearing and ruling upon benefit claims under certain Bell Atlantic Plans. The Committee met and reviewed your claim requesting that Mr. Jack F. Paschall be compensated under the Retirement Incentive Program (the "Program") under the Bell Atlantic Management Pension Plan, effective December 15, 1991. After evaluating all the facts relevant to Mr. Paschall's case

the Committee regrets it was unable to grant your claim.

The Committee's decision was based on the following provisions:

The Bell Atlantic Separation Pay Plan states in part:

> "...The Bell Atlantic Corporate Employees' Benefits Committee is the "Plan Administrator" and reserves the right to end or modify the Plan's provisions, terms, and conditions, and to increase or decrease the amounts of benefits, at any time, with or without advance notice to employees. In addition, from time to time, the Plan Administrator may, in its sole discretion, with or without advance notice to employees, adopt other separation pay plans for one or more

companies, which may apply to defined categories of employees and/or special circumstances..."

The Bell Atlantic **SPECIAL REPORT** bulletin dated August 14, 1991, page 2, under the heading "HIGHLIGHTS OF PENSION AND OTHER BENEFIT CHANGES", states in part:

"...The retirement incentives apply to employees who are eligible to retire as of Dec. 15, 1991, as well as those who become eligible as of that date by the addition of 3 years of age and 3 years of service..."

Further, under "Retirement Incentives", states in part:

"... these employees have the advantage of the following temporary changes if they

retire on a one-day "window" of Dec. 15, 1991..."

The **QUESTIONS AND ANSWERS** Supplement to the Special Report dated august 14, 1991, question number 32, states in part:

"32. Will these pension changes apply to employees who left under any of the 1991 Force Management Programs (FMP)? People who retire in 1991 prior to December 15, 1991? Other voluntary or involuntary separations?

No. Any employee who leaves the payroll for any reason prior to December 15, 1991, is not eligible for any of the pension enhancements relating to this retirement incentive program..."

RETIREMENT INCENTIVE PROGRAM UNDER PENSION PLANS dated August 7, 1991, states in part:

> "RESOLVED, that the Bell Atlantic Management Pension Plan (the "BAMPP Plan") is hereby amended as follows:
>
> 1. for each active participant in the Plan, who, as of December 15, 1991 (the "Window Date"), is either eligible to retire or would be eligible to retire if credited with an additional 3 years of age and service..."

The Committee took into consideration Mr. Paschall's concerns and wishes to be compensated under the

"Window" offer. However, the 1991 Retirement Incentive Program specifically states, that you must be an active employee as of December 15, 1991 to receive any pension enhancements relating to this offer. Therefore, since Mr. Paschall participated in the Force Management Plan (FMP) as contained in the Bell Atlantic Separation Pay Plan and retired effective April 1, 1991, he does not qualify to receive benefits under the 1991 Retirement Incentive Program.

In particular, the Committee carefully considered your allegation that Bell Atlantic or Mr. Paschall's employer "induced" Mr. Paschall into taking the FMP benefit when Bell Atlantic and C&P were planning the "Window" offer. However, the Committee was unable to accept that contention. The Bell

Atlantic decision to implement a 1991 "Window" was not reached until the relevant Board action in August, 1991 authorizing the "Window". Mr. Paschall reached his decision to accept the FMP in February 1991. Accordingly, the Committee rejected your argument that Mr. Paschall was unable to make an "informed decision" to accept the FMP offer due to a claimed failure of his employer to disclose relevant information about the "Window" prior to Mr. Paschall's acceptance of the FMP in February 1991. There was no such official information in February 1991 or, in fact, until the official Board action authorizing implementation of the 1991 "Window". Accordingly, the Committee determined that no relevant official information was withheld from Mr. Paschall.

The Company did not delegate discretion to the Committee to modify the Program, therefore, the Committee denied Mr. Paschall's claim based on the above provisions.

The Committee regrets that it was not possible to decide in Mr. Paschall's favor, and realizes that this has been a disappointment for him. However, the Committee is obligated to administer the Retirement Incentive Program in accordance with the Program provisions.

If you wish to appeal the Committee's decision, you may submit a written appeal, along with any new or additional evidence within sixty (60) days of receipt of this letter to:

Secretary,

Bell Atlantic Benefit Appeals

Committee

1310 North Court House Road,

9th Floor

Arlington, VA 22201

The Bell Atlantic Benefit Appeals Committee will then review your appeal and make a determination. You will receive written notification of the Committee's decision.

Sincerely,

/s/ Geraldine Bell

Assistant Secretary

cc: J. Paschall

29 U.S.C. § 1132(a)

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought-

(1) by a participant or beneficiary-

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section.

29 U.S.C. § 1002(7)

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.